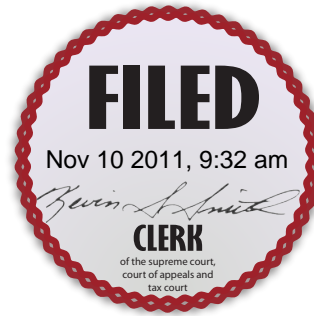


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**DEBORAH MARKISOHN**  
Marion County Public Defender Agency  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**IAN MCLEAN**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

N.B.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-1101-JV-121
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

---

APPEAL FROM THE MARION SUPERIOR COURT JUVENILE DIVISION  
The Honorable Gary K. Chavers, Judge Pro Tempore  
Cause No. 49D09-1005-JD-1312

---

**November 10, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-respondent N.B. appeals the juvenile court's determination that he is a delinquent child for committing an act that would be Arson,<sup>1</sup> a class A felony, if committed by an adult. More particularly, N.B. argues that there was insufficient evidence to support the delinquency determination.<sup>2</sup> Finding sufficient evidence, we affirm.

### FACTS

On the night of March 29, 2010, fourteen-year-old N.B. was staying overnight at his neighbors' house in Indianapolis. Richard Holliday had arranged for N.B. to watch his sons: eight-year-old J.H., seven-year-old B.H., and three-year-old I.H., while he was at work and the boys were on spring break.

Around 4:50 a.m. on March 30, 2010, Holliday awoke and hurriedly got ready for work because he was running late. Although the family used space heaters to heat their home, they were not turned on that morning. Additionally, Holliday did not have time to make breakfast or smoke cigarettes, as was his usual routine, before he left for work. When Holliday was just about ready to leave, he noticed that N.B. "looked like he was still asleep." Tr. p. 206. When Holliday "said something to him, he still acted like he

---

<sup>1</sup> Ind. Code § 35-43-1-1.

<sup>2</sup> In N.B.'s opening brief, he also asserts that the juvenile court erred when it allowed the State to amend the delinquency petition to add the names of the three children who sustained bodily injury as a result of the arson. N.B. maintained that the change was a substantive amendment and, as such, constituted a material variance that prejudiced his substantial rights. However, after a more thorough review of the record, N.B. withdraws this argument in his Reply Brief, noting that the amendment occurred prior to his denial hearing, and, therefore, he was not prejudiced by it. Consequently, we need not consider N.B.'s second argument in his opening brief.

was in a sleep. . . .[N.B.] [j]ust slurred like he was still asleep.” Id. at 218. However, N.B. later acknowledged that he was aware that Holliday had left for work.

Shortly thereafter, J.H. awoke and saw a fire burning “[o]n the table” in the dining room. Id. at 186. Holliday would later recall that laundered clothes had been stacked on the dining room table when he left for work. The subsequent investigation would reveal that the dining room sustained the heaviest fire damage and was, therefore, the room where the fire had begun. In particular, the fire’s pattern indicated that it had begun in the middle of the dining room, where the dining room table had been located.

Around 5:30 a.m., Samantha Bellows and Samantha Meyers, who were on their way to work, were driving down Holliday’s street when they observed a woman running down the street and noticed a house on fire. Bellows stated that she saw N.B. coming from his house back to the Hollidays’ house. Bellows and Meyers saw I.H. outside the house in his underwear and J.H. sitting on the ground by a broken window in the front of the house.

At 5:45 a.m., the Indianapolis Fire Department (IFD) received a 911 call reporting the fire. Firefighters entered the home and rescued B.H. As a result of the fire, J.H., B.H., and I.H. sustained serious injuries. The three children were transported to Riley Hospital, where they were placed on life support and received treatment for burns and smoke inhalation.

N.B. was also treated at Riley Hospital, but his injuries were much less severe. He had a small cut on one of his fingers and a slight friction abrasion near his armpit. N.B.

did not have blood, soot, or the odor of smoke on his person or his clothing. N.B. was treated with an inhaler but was not placed on oxygen.

An examination of the house and its surviving contents revealed no appliance, device, or similar item that could have started the fire. Expert analyses of the home's electrical system, which included x-ray examinations of appliances, showed no flaws, faults or signs that the fire was caused by an electrical problem. Although an extension cord found in the dining room was defective, insofar as it displayed an arc, testing showed that this condition most likely had been produced by fire damage, had not existed prior to the fire, and was not a potential cause of the fire.

N.B. was interviewed by investigators and relayed what had happened. N.B. stated that he had awakened to find the front room engulfed in smoke. N.B. claimed to have entered the room where J.H. was sleeping to find J.H. on the floor. While the fire burned, N.B. stated that he attempted to open a window without success. N.B. claimed that he then smashed the glass with his hand, breaking the window and allowing N.B. to pick up J.H. and throw him out of the opening. N.B. then stated that he exited the room through the window and tried to gain entry through a door. When N.B. realized the door would not open, he reentered through the front door and went to the room where I.H. was sleeping and removed him from the burning house. N.B. related the story a second time to investigators, adding that I.H. was attempting to kick at the flames when N.B. reentered the burning home.

J.H. later recalled that he first saw N.B. standing outside the house while the fire burned. J.H. saw N.B. pick up a brick and smash the window with it. J.H. also stated that N.B.'s mother helped J.H. and I.H. exit through the window. The glass fragments from the broken window were charred on only one side, indicating that the window was intact while the fire had burned and produced smoke. An examination of the glass fragments from this window revealed that the glass indeed had been broken by a force outside the home directed inward, pushing the glass into the home.

On May 20, 2010, the State filed an amended delinquency petition,<sup>3</sup> alleging that N.B. had committed three counts of what would be class A felony arson if committed by an adult. More particularly, the petition alleged that N.B. had used fire to damage Holliday's dwelling, resulting in bodily injury to B.H., J.H., and I.H. Appellee's App. p. 1. These allegations were read to N.B. by the juvenile court at his initial hearing on May 21, 2010. Tr. p. 2-3. On September 8, 2010, N.B. attempted to admit to the allegations; however, the juvenile court rejected N.B.'s attempt because he did not admit to an adequate factual basis.

A factfinding hearing was held on October 28, 2010. At the beginning of the hearing, the State moved to amend the petition by alleging that N.B. had burned a dwelling without the owner's consent. The juvenile court overruled N.B.'s objection and allowed the amendment. After hearing evidence and argument, the juvenile court found

---

<sup>3</sup> The initial delinquency petition was filed on May 18, 2010, and alleged that the fire had resulted in bodily injury to Holliday rather than to J.H., B.H., and I.H. The State amended the petition to replace Holliday with his three children.

that the allegations in the delinquency petition were true; however, it entered judgment only on the first count, concluding that the remaining counts merged into the first count.

On January 19, 2011, the juvenile court entered a dispositional order placing N.B. on probation with a suspended commitment to the Department of Correction. N.B. now appeals.

### DISCUSSION AND DECISION

N.B. argues that the evidence was insufficient for the juvenile court to determine that he was a delinquent child for committing an act that would be class A felony arson if committed by an adult. It is well settled that when reviewing the sufficiency of the evidence of juvenile adjudications, this Court will neither reweigh the evidence nor judge the credibility of witnesses. C.S. v. State, 735 N.E.2d 273, 276 (Ind. Ct. App. 2000). And although the State must prove beyond a reasonable doubt that the juvenile committed the alleged act, the evidence need not exclude every reasonable hypothesis of innocence. K.D. v. State, 754 N.E.2d 36, 38-39 (Ind. Ct. App. 2001); M.Q.M. v. State, 840 N.E.2d 441, 446 n.6 (Ind. Ct. App. 2006). Rather, this Court will affirm the adjudication if there is “substantive evidence of probative value to establish every material element of the offense.” K.D., 754 N.E.2d at 39.

To prove that N.B. committed what would be class A felony arson if committed by an adult as alleged in Count I, the State was required to show that N.B. knowingly or intentionally by means of fire damaged Holliday’s dwelling without Holliday’s consent,

resulting in bodily injury to B.H., J.H., and I.H. Ind. Code § 35-43-1-1(a)(1); Appellee's App. p. 1.

N.B. essentially argues that the evidence was insufficient because the evidence establishing that he intentionally caused the fire is circumstantial. This Court has recognized that "[a]rson is almost always subject to proof solely by circumstantial evidence." McGowan v. State, 671 N.E.2d 1210, 1214 (Ind. Ct. App. 1996). Accordingly, the fact that a witness did not see the defendant set the fire or there is no evidence that an accelerant was used will not warrant reversing the conviction. Id.; see also Williams v. State, 837 N.E.2d 615, 616-19 (Ind. Ct. App. 2005) (finding corpus delicti without evidence of an accelerant).

As noted above, Holliday hurriedly left for work because he was late; he did not prepare breakfast or smoke cigarettes, which was his usual routine, and all of the home's space heaters were turned off. Tr. p. 201-06. All three of Holliday's children were asleep when he left; however, N.B. was awake. Id. at 203, 206, 263-64. J.H. awoke shortly after Holliday left and saw the fire burning "[o]n the table" in the dining room. Id. at 186. A later forensic examination of the house would indicate that the fire began in the middle of the dining room, where the table was located, and Holliday recalled that laundered clothes had been stacked on the dining room table when he left. Id. at 98-99, 115, 118-19; 215.

Furthermore, N.B.'s first story to investigators claimed that he had awakened to find the room engulfed in smoke. Tr. p. 226-27. As the fire burned, N.B. stated that he

attempted, without success, to open a window. He then smashed the window with his hand, breaking the glass and allowing him to pick up J.H. and throw him out of the opening. Id. N.B. then ran around the house and tried unsuccessfully to gain entrance through a door and was forced to reenter through the front door. Id. N.B. then claimed that he managed to remove I.H. from the burning house. Id. N.B.'s second story to investigators added that I.H. was attempting to kick at the flames when N.B. reentered the burning home.

Although the fire was so severe that Holliday's three children sustained severe injuries and had to be placed on life support, N.B. had only minor injuries despite allegedly entering a burning room, smashing a window to rescue J.H., and then reentering the home to rescue I.H. N.B. did not have blood, soot, or the odor of smoke on his person or his clothing. Tr. p. 121-22, 124-26, 212-14. N.B. was treated with an inhaler, but was not placed on oxygen. Indeed, compared to the injuries that the other three boys sustained in their exposure to the fire, N.B. was relatively unscathed. Id. at 208-09.

J.H. recalled that he first saw N.B. standing outside the house while the fire burned. Tr. p. 187-89. J.H. saw N.B. pick up a brick and smash a window and stated that N.B.'s mother helped J.H. and I.H. exit the window. Id.

An examination of the glass fragments from this window revealed that the glass had been broken by a force outside the home directed inward, pushing the glass into the home. Tr. p. 92. The glass fragments were charred on only one side, indicating that the window was intact while the fire had burned and produced smoke. Id. at 94-95. Anyone



near the glass during this time, as N.B. claimed he had been, would have been exposed to a great deal of soot and smoke. Id. at 128. In short, N.B.'s account of the incident is inconsistent with his slight injuries, the lack of soot and smoke on his person and clothes, and J.H.'s testimony regarding the events surrounding the fire. See White v. State, 269 Ind. 479, 486, 381 N.E.2d 481, 485 (1978) (holding that lack of injuries to the defendant, when such injuries would be reasonably expected according to his own account of the fire, indicates deception and may be considered to prove that the defendant set the fire).

Moreover, a meticulous examination of the dwelling and its surviving contents indicated that no appliance, device, or similar item started the fire. Tr. p. 103-104, 112, 117-19, 134, 171-75. Expert analyses of the home's electrical system also showed no flaws, faults, or signs that the fire was caused by an electrical problem. In particular, an examination of the dining room, which was determined to be the room where the fire began, showed no electrical or other nonintentional causes for the fire. Id. at 119, 165-68. And although an extension cord displayed defective performance, testing revealed that the defect was caused by the fire and was, therefore, not a cause of the fire. Id. at 174. In light of these facts and circumstances, we cannot conclude that there was insufficient evidence to sustain N.B.'s adjudication for committing an act that would be a class A felony arson if committed by an adult.

Nevertheless, N.B. contends that because every single item that was inside the house when the fire began was not preserved, it is impossible to eliminate the missing or destroyed items as causes of an accidental fire. This argument is unavailing for two

reasons. First, N.B. did not attempt to preserve the fire scene, waiting until the day of the factfinding hearing to ask the juvenile court to dismiss the case because the fire scene had not been preserved. Tr. p. 24-25. Second, in many, if not most cases of arson, the inevitability of damage and the likelihood that extinguishing the fire will destroy at least some of the fire scene means that N.B.'s argument taken to its logical conclusion would vitiate many arson convictions. In any event, the circumstantial evidence was not required to overcome every speculative hypothesis that some unpreserved item caused the fire. M.Q.M., 840 N.E.2d at 446 n.6. Consequently, we affirm the decision of the juvenile court.

The judgment of the juvenile court is affirmed.

KIRSCH, J., and BROWN, J., concur.